

HERMAN A. KELLER

IBLA 73-372

Decided January 17, 1974

Appeal from a decision of the Montana State Office, Bureau of Land Management, canceling a simultaneous drawing from which a qualified card has been omitted, and determining lease priority on the basis of a new drawing which included all qualified cards.

Affirmed.

Oil and Gas Leases: Applications: Drawings

The protest of a successful drawee at a drawing of simultaneously filed oil and gas lease offers against the cancellation of that drawing because one offer had been erroneously omitted from it, and against the holding of a second drawing with all offers participating is properly denied.

Oil and Gas Leases: Bona Fide Purchaser

In order to invoke the bona fide purchaser protection afforded by the Act of September 21, 1959, 73 Stat. 571, as amended, 30 U.S.C. § 184(h) (1970), as regards an oil and gas lease, the lease must have issued; until execution and issuance of the lease, only an offer exists and the assignment of rights in such an offer is without the purview of the bona fide purchaser provisions in the Mineral Leasing Act.

APPEARANCES: Norman J. Pollock, Esq., of Pollock, Meyers & Eicksteadt, Marengo, Illinois, for appellant Herman A. Keller; LaVern C. Neff, Esq., of Bjella & Jestrab, Williston, North Dakota, for appellee Rae Ann Rossland.

OPINION BY MR. HENRIQUES

Herman A. Keller appeals from the decision of the Montana State Office, dated April 13, 1973, vacating the simultaneous oil and gas leasing drawing held on March 5, 1973, at which his drawing entry card for Parcel No. 58, was given priority and on the basis of a subsequent drawing held April 2, 1973, awarding priority to one

Rae Ann Rossland. The State Office action was the result of a discovery, on March 27, 1973, that an entry card for that parcel had not been included in the March 5, 1973, drawing. The State Office decision cited R. E. Puckett, A-30419 (October 29, 1965) as authority for its action.

On appeal appellant argues two points. First, he contends that the passage of time from the original drawing to the discovery of the excluded entry card in the instant case is so much greater than that which occurred in R. E. Puckett, *supra*, that the latter case cannot be said to control the disposition of this appeal. While we recognize that appellant's contention is not without some validity, we cannot agree that the greater length of time manifested in this case is sufficient to remove the case from the ambit of the general rule. Puckett is merely one of many cases which stand for the proposition that if an entry card is excluded from a simultaneous drawing that drawing is void and a new drawing, with all of the cards included, must be held. See e.g., Craig Martin, 6 IBLA 37 (1972); R. Donald Jones, A-29631 (November 4, 1963); Max H. Christensen, A-29703 (September 17, 1963); John H. Anderson, 67 I.D. 209 (1960). In the instant case the drawing occurred on March 5, 1973.

It appears that the Montana State Office retains the envelopes received during the simultaneous filing period for not less than one month. On March 27, 1973, an employee of the office, while searching

through the February envelopes for unusual stamps, prior to destruction of the envelopes, discovered the entry card 481-1878 of Mesa Verde Oil Company for Parcel #58, together with the requisite remittances for payment of filing fee and of advance rental. The card was with an envelope received February 26, 1973, at 10 a.m. The State Office determined that the Mesa Verde card had been timely received for the February simultaneous procedures but inadvertently had not been separated from its transmittal envelope and so improperly had been excluded from the drawing held March 5, 1973. Thereupon, on April 12, 1973, the State Office proceeded to hold a new drawing for Parcel #58, including all the qualified drawing entry cards. Certainly, increased diligence on the part of the State Office personnel would have avoided any of these problems, but the fact that the discovery of the omission took 22 days in the case at bar as opposed to the three days which elapsed in the Puckett case does not vitiate the need for a new drawing in which all parties are given an opportunity to participate.

As a subsidiary argument to this first point, appellant complains of the failure of the State Office to notify him of the intended redrawing until after it had occurred. He notes that in John L. O'Brien, A-30416 (April 8, 1965), the Department held that there is no need to conduct a new drawing after the discovery of an entry card excluded therefrom when the excluded offeror withdraws his offer in advance of the new drawing. Appellant contends that had he been aware of the impending redrawing he would have entered into negotiations with Mesa

Verde Oil Company in an attempt to convince it to withdraw its offer. While we perceive no barrier to an early notification of the successful drawee of a scheduled redrawing, appellant points to no regulation that would require the State Office to so act. While such a course of conduct might be justifiable, we cannot say that it is required.

The appellant's second contention is that a 50 percent interest in the lease had been assigned to one H. G. Klotz and that under the provisions of the Act of September 21, 1959, 73 Stat. 571, as amended 30 U.S.C. § 184(h) (1970), Klotz is a bona fide purchaser whose interest cannot be terminated. The short answer to this argument is that no lease having been issued, the Act of September 21, 1959, supra, does not apply in the instant case. The Act provides in relevant part:

The right to cancel or forfeit for violation of any of the provisions of this chapter shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or permit which lease, interest, option, or permit was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired, or of his predecessor in title (including the original lessee of the United States) may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. * * * (Emphasis added.) 30 U.S.C. § 184(h)(2).

Appellant attempts to argue that notwithstanding the fact that no lease ever issued to him, Klotz purchased an "option to acquire a

lease or an interest therein," and thus should be afforded the protection of bona fide purchaser status. We do not agree. The phrase "option to acquire a lease" presupposes the existence of the lease. Until the lease issues all appellant was possessed of was the right to be accorded priority if the lease issued, all other things being regular. See e.g., McDade v. Morton, 353 F. Supp. 1006, 1010 (D.D.C. 1973); Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969). It is precisely because the drawing was not regular that it was canceled. And it was the drawing that was canceled, not an existing lease.

Appellant has not cited any court decisions in support of his position. Nor are we aware of any. On the contrary, in an analogous case the United States Supreme Court held that bona fide purchaser protection was not available to those who acquired interests in entries under the Timber and Stone Act, unless patent subsequently issued. Hawley v. Diller, 178 U.S. 476, 485-490 (1900); United States v. Detroit Timber and Lumber Co., 200 U.S. 321 (1906). In Southwestern Petroleum Corp. v. Udall, 361 F.2d 650 (10th Cir. 1966) the United States Court of Appeals discussed the Congressional purpose animating the bona fide purchaser provision of the Mineral Leasing Act noting that "[i]t was imposed upon the great mass of diverse transactions with an infinite variation of facts which had taken place in the issuance and assignment of federal oil and gas leases." (Emphasis added.) Id. at 654. Congressional concern was focused on actions

occurring at issuance of a lease and subsequent thereto, not at actions occurring prior to the issuance of a lease. We conclude, therefore, that the Act of September 21, 1959, supra, is not applicable in the case before us.

Because of the omission of a qualified drawing entry card, it was necessary to cancel the original drawing for Parcel #58, which chose the offer of Herman A. Kellar for consideration. Random selection of the offer of Rae Ann Rossland from all offers timely filed was in accordance with long-standing Departmental policy.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Martin Ritvo, Member

Anne Poindexter Lewis, Member

